Usahabina v Anuar bin Yahya

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–28 OF 1997
AUGUSTINE PAUL JC
19 JANUARY 1998

Arbitration *— Stay of proceedings — Application — Whether there was dispute between parties to arbitration agreement — Whether request for extention of time to file defence and filing of unconditional appearance amount to step taken in proceedings — Whether party was willing and ready to go for arbitration — Exercise of arbitration a futility — Whether proceedings should be stayed — Arbitration Act 1952 s 6*

The plaintiff entered into an agreement with the defendant for the construction of a house according to drawings and specifications prepared by the architect. The plaintiff then commenced proceedings against the defendant for the recovery of the amount due under the agreement. The defendant entered an unconditional appearance. The defendant failed to file the defence despite being given an extension of time to do so. The plaintiff entered a judgment in default against the defendant on 15 July 1997. By letter dated 25 July 1997, the defendant informed the plaintiff that the dispute should be referred to arbitration according to cl 34 of the agreement. The defendant then filed an application praying, inter alia, for the judgment in default be set aside and the matter be stayed pending reference to arbitration. It was submitted that on the basis of the plaintiff's case, ie the architect's certificate were not final and could be challenge and since there was a dispute and as the defendant was ready and willing to go for arbitration, in accordance with cl 34, the onus was on the plaintiff to show why the matter ought not to be referred as required. The issue before the court was whether the defendant had satisfied the conditions under s 6 of the Arbitration Act 1952.

Held, dismissing the defendant's application:

(1) The plaintiff would be able to defend the judgment obtained by him on the ground that the defendant had no defence only if he can first establish that the defendant was not entitled to have had the proceedings stayed prior to the judgment having been entered against him. If the defendant is so entitled, the judgment would be irregular and would in consequence thereof be liable to be set aside (see p 700D–E).

(2) In the words of cl 34, arbitration is only available when there is a dispute between the employer or architect on his behalf and the contractor. Thus, cl 34 did not apply where there was a dispute between the employer and the architect. In this case, the defendant's complaints were against defective workmanship and the use of sub-standard materials. There was no provision in the agreement whereby the plaintiff must execute the works to the satisfaction of the defendant. The only instructions that the plaintiff must comply with were those of the architect. In the light

of the complaints of the defendant, his remedies were against the architect and not the contractor. It follows that the right to arbitration was not available to the defendant in accordance with cl 34 as his dispute should properly be with the architect and not the plaintiff (see pp 702G–703A). A

(3) The defendant's request for extension of time to file his defence did not amount to the taking of any steps in the proceedings. However, the filing of an unconditional appearance meant that he had elected to allow the action to go on and had accordingly submitted to the jurisdiction of the court. This amounted to a step in the proceedings thereby precluded himself from an order staying the proceedings (see p 705B–C). B C

(4) The applicant must affirm in his affidavit that at the time the action was commenced, he was and still remains ready and willing to do all things requisite to enable all the matters in dispute to be determined by arbitration in accordance with the provisions of the arbitration agreement. In the present case, the letter dated 25 July 1997 from the defendant showed that the defendant was not even aware of cl 34 of the agreement at the commencement of the proceedings. Thus, the question of him being ready and willing to go for arbitration at that stage did not arise with the result that this condition had not been satisfied (see p 707C–E). D

(5) The conclusiveness of a final certificate could be challenged only if a request for arbitration was sought within the period specified in the agreement. In that event, the final certificate ceased to be final and may be re-opened for resolution (see p 713G). E

(6) Certificate No 05 although called a penultimate certificate was an interim certificate as it was issued before the completion of the works. Certificate No 06 was issued after the issue of the certificate of making good defects and was referred to as 'final'. However, when it was issued, the amount due as stated in the penultimate certificate was also due. Thus, the amount stated in it as being due was not in accordance with cl 30(6) of the agreement. In the final certificate, a statement of the final balance was indispensable. Therefore, this certificate must also be regarded as an interim certificate as it specified only the amount then due without taking into account previous balance due. If the defendant wished to dispute the amounts stated in the two certificates, he ought to have asked the architect to make appropriate adjustments in another certificate or take the dispute to arbitration, both of which he did not do (see pp 717H–718B). F G H

(7) In any event, a reference to arbitration in this case would be an exercise in futility. In view of the obligation of the defendant to pay under the certificates, the arbitrator would merely have to make an order in terms of the amounts stated to be due in the certificates. This means that the defendant had effectively lost his right to arbitration by not seeking arbitration within the time I

stipulated in the agreement. This certainly militates against exercising the discretion in favour of the defendant to stay the proceedings as he will achieve precious little before the arbitrator (see p 718B–D).

(8) Accordingly, the court hold that a stay of proceedings in this case was not warranted prior to entry of judgment against the defendant. Thus, the judgment obtained against him was regular (see p 718H).

[Bahasa Malaysia summary

Plaintif telah memasuki suatu perjanjian dengan defendan untuk pembinaan sebuah rumah mengikut lukisan-lukisan dan spesifikasi-spesifikasi yang disediakan oleh arkitek. Plaintif kemudiannya memulakan prosiding terhadap defendan untuk mendapat kembali jumlah yang kena dibayar di bawah perjanjian tersebut. Defendan memasuki kehadiran tidak bersyarat. Defendan gagal memfailkan pembelaan walaupun telah diberi lanjutan masa untuk berbuat demikian. Plaintif memasukkan penghakiman ingkar terhadap defendan pada 15 Julai 1997. Melalui surat bertarikh 25 Julai 1997, defendan memberitahu plaintif bahawa pertikaian tersebut seharusnya dirujukkan kepada timbang tara menurut fasal 34 perjanjian tersebut. Defendan kemudiannya memfailkan permohonan memohon, inter alia, untuk penghakiman ingkar diketepikan dan perkara tersebut digantung sementara rujukan kepada timbangtara. Adalah dihujahkan bahawa berdasarkan asas kes plaintif, ie sijil arkitek adalah tidak muktamad dan boleh dicabar dan memandangkan terdapatnya pertikaian dan kerana defendan bersedia dan sanggup ke timbang tara, selaras dengan fasal 34, beban adalah pada plaintif untuk menunjukkan mengapa perkara tersebut tidak seharusnya dirujukkan seperti yang diperlukan. Isu di hadapan mahkamah adalah sama ada defendan telah memenuhi syarat-syarat di bawah s 6 Akta Timbangtara 1952.

Diputuskan, menolak permohonan defendan:

(1) Plaintif boleh membela penghakiman yang diperolehi oleh beliau atas alasan bahawa defendan tidak mempunyai pembelaan hanya jika beliau boleh mula-mulanya membuktikan bahawa defendan adalah tidak berhak untuk menggantung prosiding sebelum penghakiman dimasukkan terhadapnya. Jika defendan berhak, penghakiman tersebut akan adalah luar aturan dan ia boleh diketepikan (lihat ms 700D–E).

(2) Di dalam perkataan-perkataan fasal 34, timbang tara hanya terpakai apabila terdapat pertikaian antara majikan atau arkitek bagi pihak beliau dan kontraktor. Maka, fasal 34 tidak terpakai apabila terdapat pertikaian antara majikan dan arkitek. Di dalam kes ini, aduan-aduan defendan adalah terhadap kemahiran defektif dan penggunaan bahan-bahan sub-kualiti. Tiada terdapat

peruntukan di dalam perjanjian tersebut di mana plaintif mesti melaksanakan kerja-kerja sehingga kepuasan defendan. Arahan-arahan yang mana mesti dipatuhi plaintif adalah hanya berkenaan dengan arkitek. Berdasarkan aduan-aduan defendan, remedi-remedi beliau adalah terhadap arkitek dan bukannya terhadap kontraktor. Dengan demikian, hak untuk menimbang tara adalah tidak terbuka kepada defendan menurut fasal 34 memandangkan pertikaian beliau sepatutnya dengan arkitek dan bukan dengan plaintif (lihat ms 702G–703A).

(3) Permintaan defendan untuk lanjutan masa untuk memfailkan pembelaan tidak terjumlah kepada pengambilan apa-apa langkah-langkah di dalam prosiding. Walau bagaimanapun, pemfailan kehadiran tidak bersyarat bermakna bahawa beliau telah memilih untuk membenarkan tindakan tersebut berterusan dan, oleh itu, telah menyerah kepada bidang kuasa mahkamah. Ini terjumlah kepada suatu langkah di dalam prosiding dan, dengan demikian, menghalang beliau daripada suatu perintah penggantungan prosiding (lihat ms 705B–C).

(4) Pemohon mesti berikrar di dalam afidavit beliau bahawa pada masa tindakan dimulakan, beliau adalah dan masih bersedia dan sanggup untuk membuat semua perkara-perkara yang perlu untuk membolehkan semua perkara-perkara di dalam pertikaian ditentukan oleh timbang tara, selaras dengan peruntukan-peruntukan di dalam perjanjian timbang tara tersebut. Di dalam kes ini, surat bertarikh 25 Julai 1997 daripada defendan menunjukkan bahawa defendan tidak sedar langsung tentang fasal 34 perjanjian tersebut pada permulaan prosiding. Maka, persoalan bahawa beliau bersedia dan sanggup merujuk penimbang tara pada tahap itu tidak timbul dan ini mengakibatkan syarat ini tidak dipenuhi (lihat ms 707C–E).

(5) Sejauh mana muktamadnya sijil terakhir hanya boleh dicabar jikalau permintaan untuk menimbang tara adalah dipohon dalam tempoh yang ditentukan di dalam perjanjian tersebut. Maka demikian, sijil muktamad tidak lagi muktamad dan boleh dibuka semula untuk resolusi (lihat ms 713G).

(6) Sijil No 05 walaupun dipanggil suatu sijil kedua terakhir adalah merupakan sijil interim kerana ia dikeluarkan sebelum kerja-kerja tersebut disiapkan. Sijil No 06 adalah dikeluarkan setelah pengeluaran sijil membaiki pulih kecacatan-kecacatan dan adalah dirujuk sebagai 'muktamad'. Tetapi, apabila ia dikeluarkan, jumlah yang kena dibayar seperti mana yang tercatat di dalam sijil kedua terakhir adalah juga kena dibayar. Maka, jumlah yang tercatat di dalamnya yang kena dibayar adalah tidak selaras dengan fasal 30(6) perjanjian tersebut. Di dalam sijil muktamad, suatu kenyataan baki muktamad adalah amat diperlukan. Maka, sijil ini mesti juga dianggap sebagai sijil interim memandangkan ia hanya menentukan jumlah yang kena dibayar tanpa mengambil kira jumlah kena dibayar

yang terdahulu. Jika defendan ingin mempertikaikan jumlah-jumlah yang tercatat di dalam kedua-dua sijil tersebut, beliau seharusnya meminta arkitek tersebut untuk membuat pelarasan-pelarasan yang sewajarnya di dalam sijil yang lain atau membawa pertikaian tersebut kepada timbang tara yang mana kedua-duanya tidak dibuat oleh beliau (lihat ms 717H–718B).

(7) Dalam apa jua keadaan, rujukan kepada timbang tara di dalam kes ini akan merupakan usaha yang sia-sia. Memandangkan obligasi defendan untuk membayar di bawah sijil-sijil tersebut, penimbang tara hanya sekadar mesti membuat suatu perintah tentang jumlah-jumlah yang dicatatkan kena dibayar di dalam sijil-sijil tersebut. Ini akan bermakna bahawa defendan telah secara efektifnya hilang hak beliau untuk menimbang tara dengan tidak minta untuk menimbang tara dalam tempoh yang ditentukan di dalam perjanjian tersebut. Ini tentu sekali menghalang pelaksanaan budi bicara untuk berpihak kepada defendan untuk mengantungkan prosiding kerana beliau hanya akan mencapai sedikit di hadapan penimbang tara (lihat ms 718B–D).

(8) Maka, mahkamah memutuskan suatu penggantungan prosiding di dalam kes ini adalah tidak wajar sebelum kemasukan penghakiman terhadap defendan. Oleh itu, penghakiman yang diperolehi terhadap beliau adalah mengikut aturan (lihat ms 718H).]

Notes

For cases on stay of proceedings generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1014–1052.

Cases referred to

Adams v Catley (1892) 66 LT 687 (refd)
Alagappa Chettiar v Palanivelpillai & Ors [1967] 1 MLJ 208 (refd)
Austin & Whiteley Ltd v S Bowley & Son (1913) 108 LTR 921 (refd)
'Avro International', The; The 'Avro Venture'; 'Avro International' (Owners of) v Arabian Marine Bunkers Sales Co Ltd & Anor [1988] 1 MLJ 147 (refd)
Brighton Marine Palace & Pier Ltd v Woodhouse [1893] 2 Ch 486 (refd)
Bristol Corp v John Aird & Co [1913] AC 241 (refd)
Carmel Exporters (Sales) Ltd v Sea-Land Services Inc [1981] 1 All ER 984 (refd)
Chappell v North [1891] 2 QB 252 (refd)
Cheah Wai Poh v Chin Brothers & Co Ltd [1958] MLJ 215 (not folld)
Chuan Hup Agencies Pte Ltd v Global Minerals (Sarawak) Sdn Bhd [1990] 1 MLJ 305 (refd)
County Theatres & Hotels Ltd, The v Knowles [1902] 1 KB 480 (refd)
'Dong Moon', The; Trans Asia Shipping Co Ltd v 'Dong Moon' Owners & Ors [1979] 1 MLJ 152 (not folld)
Drouth v The Ship 'GG Paul Doumer' [1934] MLJ 72 (not folld)

Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177 (refd)
English Industrial Estates Corp v George Wimpey & Co Ltd [1973] 1 Lloyd's Rep 118 (refd)
Ford's Hotel Co Ltd v Bartlett [1896] AC 1 (refd)
Hashim bin Majid v Param Cumaraswamy & Ors [1993] 2 MLJ 20 (not folld)
Housing Society Ltd v United Asia Investment Ltd Ors [1972] 1 MLJ 113 (refd)
Ives and Barker v Willans [1894] 2 Ch 478 (refd)
James Png Construction Pte Ltd v Tsu Chin Kwan Peter [1991] 1 MLJ 449 (refd)
Kirsch v HP Brady Pty Ltd (1937) 58 CLR 36 (refd)
Lane v Herman [1939] 3 All ER 353 (refd)
Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 (not folld)
Lian Seng Construction Co v Yuzin [1970] 1 MLJ 108 (refd)
Lim Su Sang v Teck Guan Construction & Development Co Ltd [1966] 2 MLJ 29 (refd)
Ling Heng Toh Co v Borneo Development Corp Sdn Bhd [1973] 1 MLJ 23 (refd)
Lubenham Fidelities & Investment Co Ltd v South Pembrokeshire District Council (1985) 33 BLR 39 (refd)
Major & Anor v Greenfield [1965] NZLR 1035 (refd)
Malayan Banking Bhd & Anor v Swasta Jaya Sdn Bhd [1990] 2 MLJ 12 (refd)
Malaysia Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors [1972] 1 MLJ 113 (refd)
Messiniaki Tolmi [1984] Ll LR 266 (refd)
P & M Kaye Ltd v Hosier & Dickinson Ltd [1972] 1 All ER 121 (refd)
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (refd)
Pitchers Ltd v Plaza (Queensbury) Ltd [1940] 1 All ER 151 (refd)
Roussel-Uclaf v GD Searle & Co Ltd and GD Searle & Co [1978] 1 Lloyd's Rep 225 (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)
Sheldon v Brown Bayley's Steelworks Ltd & Anor [1953] 2 All ER 894 (refd)
Shen Yuan Pai v Dato Wee Hood Teck & Ors [1976] 1 MLJ 16 (refd)
Smith & Co v British Marine Mutual Insurance Association (1883) WN 176 (refd)
Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena) [1995] 3 MLJ 273 (refd)
Teknik Cekap Sdn Bhd v Nirwana Indah Sdn Bhd [1996] 4 MLJ 154 (refd)
Wilkinson v Barking Corp [1948] 1 All ER 564 (refd)

Legislation referred to

Arbitration Act 1952 s 6
English Arbitration Act 1950 s 4(2)

Ravinathan Muthiah (*Ravi Muthiah & Co*) for the plaintiff.
Zulkifli (*Bakar & Partners*) for the defendant.

Augustine Paul JC: On 27 February 1993 Anuar bin Yahya ('the defendant') and Usahabina ('the plaintiff') entered into an agreement ('the agreement') for the construction of a split-level house according to drawings and specifications prepared by Akitek Suria ('the architect') at a cost of RM1,226,177.40 ('the contract sum'). It was agreed by the parties that the date of commencement of construction work shall be 27 January 1993 and the date of completion shall be 26 October 1993. The contract sum was later reduced to RM989,200.31.

By his writ of summons dated 13 May 1997 the plaintiff commenced proceedings against the defendant for the recovery of a sum RM467,410.98 being amount due on the construction of the house. In para 3 of the statement of claim, the plaintiff alleged that the amount claimed is made up of RM292,554.02 in respect of Architect's Certificate No 05 bearing serial No AS 9205 dated 15 November 1994 and a sum of RM174,856.96 in respect of Architect's Certificate No 06 bearing Serial No AS 9205 dated 17 April 1996. On 13 June 1997 the writ of summons was served on the defendant who entered an unconditional appearance to it on 19 June 1997. The defendant did not file his defence within the time limited for doing so, that is to say, by 3 July 1997. The plaintiff allowed the defendant's request for an extension of one week to file the defence. As he failed to file the defence within the extended period the plaintiff entered judgment in default on 15 July 1997. By letter dated 25 July 1997 the solicitors for the defendant informed the solicitors for the plaintiff that:

> (2) Upon perusing documents in our clients' possession we came across the contract document between our mutual clients. Clause 34 of the contract document stipulates that a reference to arbitration shall be made to resolve any dispute. A copy of the relevant clause is attached herewith for your attention.
>
> (3) We believe arbitration is the best avenue to settle this dispute speedily. Your clients' claims as per statement of claim could be assessed accordingly. Our client is alleging a breach of contract too. Particularly on poor workmanship, substandard material and unprofessional conduct.
>
> (4) As such we are instructed to give you notice that our client wishes for the disputes to be referred to an arbitrator. Please nominate an arbitrator for our clients' consideration. Pursuant thereto kindly confirm whether you are agreeable that the above suit be stayed and the matter be referred to arbitration.

Soon after that the defendant received a copy of the judgment on 31 July 1997. On 6 August 1997 he filed a summons-in-chambers praying for an order, inter alia, that:

(a) the judgment in default be set aside; A

(b) the matter be stayed and/or referred to an arbitrator;

(c) alternatively, he be allowed to bring in a third party to the proceedings; and

(d) alternatively, he be allowed to file his defence and counterclaim. B

In substance, therefore, the application of the defendant is to have the judgment set aside and for the case to be stayed pending reference to arbitration or, alternatively, for leave to be allowed to file his defence and other relevant documents.

In his submission before me learned counsel for the defendant contended that as there is a dispute between the parties the matter must be referred to arbitration pursuant to cl 34 of the agreement and thus the judgment cannot stand. Particulars of the dispute are enumerated in the defendant's affidavit filed on 8 September 1997 where it is affirmed that the works carried out are not in accordance with the terms of the agreement as: C

(a) plaintif gagal memasang cermin dengan sempurna pada satu bahagian dinding kolam renang yang turut menjadi dinding bilek besmen (basement); D

(b) plaintif gagal menggunakan bahan-bahan binaan bermutu seperti yang sepatutnya;

(c) plaintif gagal memasang bahan-bahan binaan dengan sempurna; E

(d) plaintif gagal membersihkan kawasan rumah setelah meninggalkan kerja-kerja pembinaan; dan

(e) plaintif menyerahkan kunci rumah baru pada pihak ketiga.

Learned counsel added that the basis of the plaintiff's case, the architect's certificates, is not final and can be challenged. He said that as there is a dispute and as the defendant is ready and willing to go for arbitration in accordance with cl 34 of the agreement the onus is on the plaintiff to show why the matter ought not to be referred as required. In support of his argument he relied on *Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459. In the affidavit in support of the application it was affirmed that after the extension of time to file the defence was granted it was realized that the matter must be referred to arbitration. The plaintiff was accordingly informed of this by letter dated 25 July 1997 which I have reproduced earlier. It was further affirmed that if the defendant had filed his defence he would have lost his right to arbitration. F G H

In his submission learned counsel for the plaintiff contended that the question of a stay of proceedings can arise only if, in the first place, the judgment has been set aside. He said that this cannot be done as the judgment is regular. He then added that the certificates given by the architect are final and conclusive of the claim by the plaintiff and thus cannot be challenged as provided by cl 30(6), (7) and (8) of the agreement. In support of his argument he referred to pp 150–153 of *The Malaysian* I

A *Standard Form of Building Contract* by Vincent Powell-Smith which deal with the nature and effect of an architect's final certificate. He said that the failure by the defendant to request for the appointment of an arbitrator before the issue of the final certificate made the certificate conclusive. In support of this argument he relied on *James Png Construction Pte Ltd v Tsu Chin Kwan Peter* [1991] 1 MLJ 449. He then referred to cases such as B *Teknik Cekap Sdn Bhd v Nirwana Indah Sdn Bhd* [1996] 4 MLJ 154, *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177 and *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 to argue that the conditions necessary to grant a stay of proceedings pending arbitration have not been satisfied. Finally, he said C that as the defendant intends to commence third party proceedings a stay should not be granted based on *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273. I interpolate to add that some of the issues and authorities on which my judgment is based were not initially raised or argued by both parties. On 12 December 1997, I called both counsel to chambers and requested them to submit on the following D matters:

(a) the effect of the judgment of the Federal Court in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57;

(b) whether the defendant has effectively lost his right to arbitration by E not seeking arbitration within the time stipulated in the agreement;

(c) whether the entry of unconditonal appearance amounts to taking a step in the proceedings;

(d) whether the defendant was ready and willing to go for arbitration; and

(e) whether the certificates relied on by the plaintiff amount to final F certificates.

The case was then fixed for continued hearing on 9 January 1998 to enable parties to make their submissions. Learned counsel for the plaintiff submitted a written submission before that date. On 9 January 1998 when the case was called up for hearing learned counsel for the plaintiff who also G appeared on behalf of the defendant said that the defendant does not wish to make any further submissions. I then adjourned the case to a date to be fixed for decision.

Before I proceed any further I shall make a brief reference to the format of the agreement. It is in accordance with the Malaysian Standard Form of H Building contract (PAM/ISM 69). This format was issued in 1969 under the sanction of the Pertubuhan Akitek Malaysia (PAM) and the Institution of Surveyors of Malaysia (ISM). It is closely modelled on the form published by the United Kingdom Joint Contracts Tribunal (JCT) in its 1963 edition. The English form has been subjected to considerable criticism. In *English Industrial Estates Corp v George Wimpey & Co Ltd* [1973] I 1 Lloyd's Rep 118, Edmund Davies LJ described the document as 'a farrago of obscurities'. The English form was withdrawn in 1980 and a new version was issued while there has been no change in the Malaysian form.

In commenting on the nature of the Malaysian form, Vincent Powell-Smith in his book entitled *The Malaysian Standard Form of Building Contract* says at p 2:

> The PAM form is a contract for a lump sum, ie the contractor undertakes to complete the whole work for a stated and fixed amount of money payable by the employer. ... A contract on PAM terms is an entire contract for a lump sum, but the contractor becomes entitled to payments only on reaching the various interim stages and, so far as the retention amounts are concerned, on completion of the works.

And at p 3:

> It is important to remember that, like other standard forms of contract, the PAM form must be read against the background of the general law of contract. The standard form is not a self-sufficient and self-contained document containing all the rights and obligations of the parties. It must be read and understood in the light of the general law and in particular that part of the law governing contractual relationships. In this respect, Malaysia is fortunate in having the Contracts Act 1950 (Act 136) which is essentially a codification of the English common law.

The plaintiff would be able to defend the judgment obtained by him on the ground that the defendant has no defence only if he can first establish that the defendant was not entitled to have had the proceedings stayed prior to judgment having been entered against him. If the defendant is so entitled the judgment would be irregular and would, in consequence thereof, be liable to be set aside. The power to stay proceedings is governed by s 6 of the Arbitration Act 1952 ('s 6') which enables the court to grant a stay of all proceedings before it in any action initiated by a party to arbitration on an application by the other party seeking to have the disputes or differences resolved through arbitration. The section reads as follows:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Under s 6 the conditions that must be satisfied by the defendant in order to entitle him to a stay of the proceedings are:

(a) there must be a valid arbitration agreement covering the question in dispute;

(b) he must be entitled to rely on the arbitration agreement;

(c) he must have taken no other steps in the proceedings;

(d) he is ready and willing to arbitrate; and

(e) there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement.

(See 2 *Halsburys Laws of England* (4th Ed) paras 560–566; *Chuan Hup Agencies Pte Ltd v Global Minerals (Sarawak) Sdn Bhd* [1990] 1 MLJ 305.)

It is well known that if a party can satisfy the court that the conditions for the grant of a stay under s 6 are satisfied, it does not ipso facto follow that he will be entitled, as of right, to a stay, for the court still retains a discretion to refuse it (see *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97). Though the power to grant a stay is purely discretionary the exercise of it must be founded upon judicial principles (see *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273). In exercising the discretion the court will have regard to all the circumstances of the particular case (see *Housing Society Ltd v United Asia Investment Ltd Ors* [1972] 1 MLJ 113; *Bristol Corp v John Aird & Co* [1913] AC 241; *Teknik Cekap Sdn Bhd v Nirwana Indah Sdn Bhd* [1996] 4 MLJ 154). In the absence of any reason being shown to the contrary the discretion will generally be exercised in favour of the applicant seeking stay of the action before the court (see *Lim Su Sang v Teck Guan Construction & Development Co Ltd* [1966] 2 MLJ 29; *Lian Seng Construction Co v Yuzin* [1970] 1 MLJ 108). Where a party seeking stay of the legal proceedings is shown to have satisfied all the conditions stipulated by s 6 the onus will then be on the party who wants to keep out of arbitration to satisfy the court that there are good reasons for the case to proceed (see *Alagappa Chettiar v Palanivelpillai & Ors* [1967] 1 MLJ 208).

I shall now consider the conditions that I have highlighted earlier.

(a) *Whether there is a valid arbitration agreement concerning the question in dispute*

It cannot be disputed that the agreement contains provision for arbitration. It can be found in cl 34 which reads as follows:

(1) In the event that any dispute or difference should arise between the employer or architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this contract to the discretion of the architect or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation mentioned in cl 30(5)(a) of these conditions or the rights and liabilities of the parties under cll 25, 26, 31 or 32 of theses conditions), then such disputes or differences shall be referred to arbitration.

Upon the disputes or differences having arisen any party may serve written notice on the other party that such disputes or differences shall be referred to an arbitrator to be agreed between the parties or failing agreement or absence of reply or reluctance to act by the other party then the party may, after the expiry of 14 days from the date of the

notice to concur on the appointment of an arbitrator, apply to the President or Vice President for the time being of Pertubuhan Akitek Malaysia to appoint an arbitrator and such arbitrator so appointed shall by virtue of this agreement be deemed to be appointed with the agreement and consent of the parties to the contract. A

Upon appointment the arbitrator shall with despatch initiate the arbitration proceedings following the provisions of the Arbitration Act 1952 (Revised 1972). The hearing may be 'ex parte' should either party, having been given due notice, fail to attend. B

(2) Such reference, except on art 3 or art 4 of the articles of agreement, or on the questions whether or not the issue of an instruction is empowered by these conditions, whether or not a certificate has been improperly withheld or is not in accordance with these conditions, or on any dispute or difference under cll 31 and 32 of these conditions, shall not be opened until after practical completion or alleged practical completion of the works or termination or alleged termination of the contractor's employment under this contract, or abandonment of the works, unless with the written consent of the employer or the architect on his behalf and the contractor. C D

(3) Subject to the provisions of cl 2(2) and 30(7) of the conditions the arbitrator shall, without prejudice to the generality of his powers, have power to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given. E F

(4) The award of such arbitrator shall be final and binding on the parties.

The question of whether there was a dispute between the parties will become apparent as the judgment progresses.

(b) *Whether the defendant is entitled to rely on the arbitration agreement* G

In the words of cl 34(1) arbitration is only available where there is a dispute '... between the employer or architect on his behalf and the contractor ... .'. Thus the parties to arbitration can only be the employer or the architect on his behalf on the one part and the contractor on the other part. In *Major & Anor v Greenfield* [1965] NZLR 1035 similar words in a contract were held to be not apt to cover a dispute between the employer and his architect where a certificate had been given in such a way that there was no dispute between the architect and the contractor. Thus cl 34 does not apply where there is a dispute between the employer and the architect. In this case the defendant's complaints are against defective workmanship and the use of sub-standard materials. There is no provision in the agreement whereby the plaintiff must execute the works to the satisfaction of the defendant. The only instructions that the plaintiff must comply with are those of the H I

A architect. In the light of the complaints of the defendant his remedies are against the architect and not the contractor. It follows that the right to arbitration is not available to the defendant in accordance with cl 34(1) as his dispute should properly be with the architect and not the plaintiff.

(c) *Whether the defendant has taken any other steps in the proceedings*

B As to what constitutes a step in the proceedings useful reference may be made to *Ives and Barker v Willans* [1894] 2 Ch 478 where Lindley LJ said at p 484:

> The authorities shew that a step in the proceedings means something in the nature of an application to the court, and not mere talk between solicitors or
C solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings.

In endorsing Lindley LJ's view Luxmoore LJ said in *Lane v Herman* [1939] 3 All ER 353 (at p 356A–B):

D > I think that what was said by Lindley LJ is really the best guide to what is a step in the proceedings in a case of this kind. It must be a step taken in the proceedings in the technical sense if it is to be held to bar an application for a stay under s 4 [English Arbitration Act 1889].

Appearing in chambers and asking for leave to defend has been held to be
E the taking of a step in the proceedings (see *Pitchers Ltd v Plaza (Queensbury) Ltd* [1940] 1 All ER 151). So is applying for leave to interrogate the defendant on his counterclaim (see *Chappell v North* [1891] 2 QB 252); applying for stay until security for costs was given (see *Adams v Catley* (1892) 66 LT 687); taking out a summons and obtaining an order for further time to deliver a defence (see *Ford's Hotel Co Ltd v Bartlett* [1896]
F AC 1); attending a hearing of a summons for directions on which an order was made or an undertaking given (see *The County Theatres and Hotels Ltd v Knowles* [1902] 1 KB 480) and applying for time or accepting a short notice of trial (see *Smith & Co v British Marine Mutual Insurance Association* [1883] WN 176). On the other hand a defendant's solicitors writing for further time to deliver defence (see *Brighton Marine Palace & Pier Ltd v*
G *Woodhouse* [1893] 2 Ch 486); giving notice to the plaintiff, upon entering an appearance, requiring him to deliver his statement of claim (see *Ives and Barker v Willans* [1894] 2 Ch 478) and filing affidavits and contesting an application for an interlocutory injunction (see *Roussel-Uclaf v GD Searle & Co Ltd and GD Searle & Co* [1978] 1 Lloyd's Rep 225) have been held not
H to be steps in the proceedings. Thus the defendant's request for extension of time to file his defence does not amount to the taking of any steps in the proceedings.

What requires consideration is whether the entry of unconditional appearance by the defendant amounts to the taking of a step in the proceedings. Where the appearance is conditional it does not amount to a
I submission to the jurisdiction of the court and an application may be made challenging the jurisdiction of the court. The effect of an unconditional appearance is the waiver of any irregularity there may be and a submission

to the jurisdiction of the court (see *Sheldon v Brown Bayley's Steelworks Ltd & Anor* [1953] 2 All ER 894). In this regard Lee Hun Hoe CJ (Borneo) in writing for the (then) Supreme Court in *Malayan Banking Bhd & Anor v Swasta Jaya Sdn Bhd* [1990] 2 MLJ 12 said at p 16:

> Appearance is a very important process by which a defendant shows his intention to defend and submits himself to the jurisdiction of the court.

In *Carmel Exporters (Sales) Ltd v Sea-Land Services Inc* [1981] 1 All ER 984 Robert Goff J (as he then was) said at p 987:

> On the other hand, if the defendant did enter an appearance, he thereby not only showed his intention to defend the suit but also submitted himself to the jurisdiction of the court. If a defendant wished to challenge the jurisdiction of the court, there were two courses open to him. First he might, with the leave of the court, enter a conditonal appearance in the action. This had the effect of preventing the plaintiff from entering judgment in default of appearance, while maintaining the defendant's right to object to the jurisdiction of the court, or indeed to any irregularity in the issue or service of the writ. However, subject to that right, a conditional appearance was a complete appearance to the action for all purposes. Accordingly, on the expiration of the relevant time, if no application had been made by the defendant to set aside the proceedings, or he had made such an application and it had been dismissed, the appearance stood as unconditional and the plaintiff could proceed with the action.

It must be observed that when a writ is served on a person in respect of a contract with an arbitration clause in it he has to elect whether he will allow the action to go on or avail himself of the arbitration clause. The filing of an unconditional appearance means that he has elected to allow the action to go on and has accordingly submitted to the jurisdiction of the court. This amounts to a step in the proceedings. On the effect of a submission to the jurisdiction of the court, Robert Goff LJ said in the *Messiniaki Tolmi* [1984] Ll LR 266 at p 270:

> Now a person voluntarily submits to the jurisdiction of the court if he voluntarily recognizes, or has voluntarily recognized, that the court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular, he makes a voluntary submission to the jurisdiction if he takes a step in proceedings which in all the circumstances amounts to a recognition of the court's jurisdiction in respect of the claim which is the subject matter of those proceedings. The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the court exercising its jurisdiction in respect of such claim.

As 2 *Halsbury's Laws of England* (4th Ed) Reissue says at para 627:

> A step in the proceedings is an act which both invokes the jurisdiction of the court and which demonstrates the applicant's election to allow the action to proceed.

In this regard I refer to *Austin & Whiteley Ltd v S Bowley & Son* (1913) 108 LTR 921 where Ridley J said:

> In my opinion what is intended by a step in the proceedings in some step which indicates an intention on the part of a party to the proceeding that he

A desires that the action should proceed and has no desire that the matter should be referred to arbitration. I cannot see how in common sense the words of s 4 can apply to something which a defendant has to do in order to save himself from having execution levied upon his goods. That is all the defendants desired to do here when they gave notice to defend.

B It cannot be argued that the entry of unconditional appearance by the defendant was done for the purpose of merely preventing any order being made against him. In that event the proper course for the defendant to have done would have been to enter conditional appearance. It is therefore my view that the entry of unconditional appearance amounts to the taking of a step in the proceedings within the meaning of s 6. My conclusion is a C departure from cases such as *Drouth v The Ship 'GG Paul Doumer'* [1934] MLJ 72, *Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459, *Cheah Wai Poh v Chin Brothers & Co Ltd* [1958] MLJ 215, *The 'Dong Moon'; Trans Asia Shipping Co Ltd v 'Dong Moon' Owners & Ors* [1979] 1 MLJ 152 and *Hashim bin Majid v Param Cumaraswamy & Ors* [1993] 2 MLJ 20. In departing from these cases I consider it sufficient to D refer to *The 'Dong Moon'; Trans Asia Shipping Co Ltd v 'Dong Moon' Owners & Ors* [1979] 1 MLJ 152 where Arulanandom J in holding that the entry of unconditional appearance does not preclude a stay of proceedings within the meaning of s 6 said at p 153:

> E The plaintiffs resisted the application on a preliminary objection on the ground that unconditional appearance had been entered. It was argued that once unconditional appearance is entered, the jurisdiction of the court cannot be challenged. This submission is devoid of merit. One of the conditions which must be fulfilled in order to obtain a stay of proceedings is that no step should be taken *after appearance.* An unconditional appearance by itself is not a waiver of the defendants' right to apply for stay. In *Wilkinson v Barking Corp* [1948] 1 All ER 564, Asquith LJ stated as follows:
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> > 'The Supreme Court may by statute lack jurisdiction to deal with a particular matter ... It has however jurisdiction to decide whether or not it has jurisdiction to deal with such matters and by entering an unconditional appearance a litigant submits to the former jurisdiction (which exists) but not to the latter (which does not).'
>
> G In the court's view the fact that defendants entered an unconditional appearance did not preclude the court's right to entertain the application and make such order as it thinks fit. (Emphasis added.)

With respect I am unable to subscribe to the views expressed by Arulanandom J for two reasons. Firstly, his Lordship's views appear to be H anchored on English law as indicated by the statement that no steps should be taken 'after appearance'. The equivalent English provision is so worded as specifically to exclude appearance as a step in the proceedings. Section 4(2) of the English Arbitration Act 1950 reads as follows:

> I Notwithstanding anything in this Part of this Act, if any party to a submission to arbitration made in pursuance of an agreement to which the protocol set out in the First Schedule to this Act applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in

> respect of any matter agreed to be referred, any party to those legal proceedings may at any time *after appearance*, and before delivering any pleading or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings. (Emphasis added.)

This condition is absent in our law. Secondly, the reliance on *Wilkinson v Barking Corp* [1948] 1 All ER 564 is not appropriate. That case was concerned with a matter over which the court had no jurisdiction. Where a court has no jurisdiction to hear a matter it has jurisdiction to decide whether or not it has jurisdiction to hear that matter. Entry of unconditional appearance in such a case does not amount to a submission to the jurisdiction of the court for the plain reason that it does not exist. In *The 'Avro International'; The 'Avro Venture'; 'Avro International' (Owners of) v Arabian Marine Bunkers Sales Co Ltd & Anor* [1988] 1 MLJ 147 Lai Kew Chai J referred to *Wilkinson v Barking Corporation* [1948] 1 All ER 564 and said at p 150:

> The one exception from the general effect of an unconditional appearance is the situation where a court under any written law lacks jurisdiction to entertain the claim at all, as in *Wilkinson v Barking Corp* [1948] 1 KB 721. There, the defendant was allowed to assert the want of jurisdiction of the court although he had entered an unconditional appearance because a statutory tribunal and not the court was vested with the jurisdiction to entertain the claims of superannuation such as the one asserted by the plaintiff. An exception to the effect of an unconditional appearance was made in that case because the court would otherwise have entertained the claim contrary to law.

Thus, in the circumstances, Asquith LJ's observation is appropriate. However, in the case at bar the court has jurisdiction to hear the matter and the entry of unconditional appearance amounts to a submission to the jurisdiction of the court.

Accordingly, I hold that the defendant has taken a step in the proceedings by entering unconditional appearance and has thereby precluded himself from an order staying the proceedings.

(d) *Whether the defendant is ready and willing to arbitrate*

The onus is on the defendant to show that he is ready and willing to do all things necessary to the proper conduct of the arbitration. The phrase 'ready and willing' is explained by Mustill and Boyd in their book entitled *Commercial Arbitration* (2nd Ed) at p 473 in the following way:

> The applicant must show that he is ready and willing to do all things necessary to the proper conduct of the arbitration. This requirement relates both to the time when the proceedings were commenced and to the time when the court is called on to exercise its discretion. Evidence that the applicant is ready and willing must be furnished by affidavit.

A This statement is based on the old case of *Adams v Catley* (1892) 66 LT 687 and is reflected in s 6 by the use of the words '... that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration ... .' In this regard I refer to *Malaysia Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors* [1972] B 1 MLJ 113 where Abdul Hamid J (as he then was) said at p 114:

> The court is invested with the power to stay the proceedings if it is satisfied that there is sufficient reason that the matter should be referred to arbitration provided the applicant was, at the time the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct C of the arbitration.

Thus the applicant must affirm in his affidavit that at the time the action was commenced, he was, and still remains ready and willing to do all things requisite to enable all the matters in dispute to be determined by arbitration in accordance with the provisions of the arbitration agreement. This was stressed by the (then) Supreme Court in *Seloga Jaya Sdn Bhd v Pembenaan* D *Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97.

The letter dated 25 July 1997 from the defendant's solicitors to the plaintiff's solicitors, reproduced in an earlier part of the judgment, shows that the defendant was not even aware of cl 34 of the agreement at the commencement of the proceedings. Thus the question of him being ready E and willing to go for arbitration at that stage does not arise with the result that this condition has not been satisfied.

(e) *Whether there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement*

F I shall now consider whether, on the facts of this case, any useful purpose would be served in making a reference to arbitration even if it can be argued that the defendant has satisfied all the requirements of s 6. This requires a consideration of cl 30 of the agreement which reads as follows:

(1) At the period of interim certificate named in the appendix to this conditions the architect shall issue a certificate stating the amount due G to the contractor from the employer, and the contractor shall, on presenting any such certificate to the employer, be entitled to payment therefor within the period for honouring certificates named in the appendix to these conditions. Interim valuations shall be made whenever the architect considers them to be necessary for the purpose H of ascertaining the amount to be stated as due in an interim certificate.

(2) The amount stated as due in an interim certificate shall, subject to any agreement between the parties as to stage payments, be the total value of the work properly executed and of the materials and goods delivered to or adjacent to the works for use thereon up to and including a date not more than seven days before the date of the said I certificate less any amount which may be retained by the employer (as provided in sub-cl (3) of this condition) and less any instalments previously paid under this condition. Provided that such certificate

shall only include the value of the said materials and goods as and from such time as they are reasonably, properly and not prematurely brought to or place adjacent to the works and then only if adequately protected against weather or other casualties.

(3) The employer may retain the percentage of the total value of the work, materials and goods referred to in sub-cl (2) of this condition which is named in the appendix to these conditions as percentage of certified value retained. Provided always that when the sum of the amounts so retained equals the amount named in the said appendix as limit of retention fund or that amounts as reduced in pursuance of cl 16(f) and/or cl 27(c) of these conditions, as the case may be, no further amounts shall be retained by virtue of this subclause.

(4) The amounts retained by virtue of sub-cl (3) of this condition shall be subject to the following rules:

(a) The employer's interest in any amounts so retained shall be fiduciary as trustee for the contractor (but without obligation to invest) and the contractor's beneficial interest therein shall be subject only to the right of the employer to have recourse thereto from time to time for payment of any amount which he is entitled under the provisions of this contract to deduct from any sum due or to become due to the contractor.

(b) On the issue of the certificate of practical completion the architect shall issue a certificate for one moiety of the total amounts then so retained and the contractor shall, on presenting any such certificate to the employer, be entitled to payment of the said moiety within the period for honouring certificates named in the appendix to these conditions.

(c) On the expiration of the defects liability period named in the appendix to these conditions, or on the issue of the certificate of completion of making good defects, whichever is the later, the architect shall issue a certificate for the residue of the amounts then so retained and the contractor shall be supplied with a copy of a summary of the priced bills of variation not later than the end of the said period and before the issue of the final certificate under sub-cl (6) of this conditions.

(5) (a) The measurement and valuation of the works shall be completed within the period of final measurement and valuation stated in the appendix to these conditions, and the contractor shall be supplied with a copy of summary of the priced bills of variation not later than the end of the said period and before the issue of the final certificate under sub-cl (6) of this condition.

(b) Either before or within a reasonable time after practical completion of the works the contractor shall send to the architect all documents necessary for the purposes of the computations required by these conditions including all documents relating to the accounts of nominated sub-contractors and nominated suppliers.

(c) In the settlement of accounts the amounts paid or payable under the appropriate contracts by the contractor to nominated sub-contractor or nominated suppliers, the amounts paid or payable by virtue of cl 4(2) of these conditions in respect of fees or charges for which a provisional sum is included in the specification, the amounts paid or payable in respect of any insurance maintained in compliance with cl 19(2) of these conditions the tender sum (or such other sum as is appropriate in accordance with the terms of the tender) for any work for which a tender made under cl 27(g) of these conditions is accepted and the value of any work executed by the contractor for which a provisional sum is included in the specification shall be set against the relevant prime-cost or provisional sum mentioned in the specification or arising under architect's instructions issued under cl 11(3) of these conditions as the case may be, and the balance, after allowing in all cases *pro rata* for the contractor's profit at the rates shown in the Schedule of Rates shall be added to or deducted from the contract sum. Provided that no deduction shall be made in respect of any damages paid or allowed to the contractor by any sub-contractor or supplier.

(6) So soon as is practicable but before the expiration of three months from the end of the defects liability period stated in the appendix to these conditions or from completion of making good defects under cl 15 of these conditions or from receipt by the architect of the documents referred to in para (b) of sub-cl (5) of this condition, whichever is the latest, the architect shall issue the final certificate. The final certificate shall state:

(a) The sum of the amount paid to the contractor under interim certificate and the amount named in the said appendix as limit of retention fund, and

(b) The contract sum adjusted as necessary in accordance with the terms of these conditions,

and the difference (if any) between the two sums shall be expressed in the said certificate as a balance due to the contractor from the employer or to the employer from the contractor as the case may be. Subject to any deductions authorized by these conditions, the said balance as from the fourteenth day after presentation of the final certificate by the contractor to the employer shall be a debt payable by the employer to the contractor or as the case may be as from the fourteenth day after issue of the final certificate shall be a debt payable by the contractor to the employer.

(7) Unless a written request to concur in the appointment of an arbitrator shall have been given under cl 34 of these conditions by either party before the final certificate has been issued or by the contractor within 14 days after such issue, the said certificate shall be conclusive evidence in any proceedings arising out of this contract (whether by

arbitration under cl 34 of these conditions or otherwise) that the works have been properly carried out and completed in accordance with the terms of this contract and that any necessary effect has been given to all the terms of this contract which require an adjustment to be made to the contract sum, except and in so far as any sum mentioned in the said certificate is erroneous by reason of:

(a) Fraud, dishonesty or fraudulent concealment relating to the works, or any part thereof, or to any matter dealt with in the said certificate; or

(b) Any defect (including any omission) in the works, or any part thereof which reasonable inspection or examination at any reasonable time during the carrying out of the works or before the issue of the said certificate would not have disclosed; or

(c) Any accidental inclusion or exclusion or any work, materials goods or figure in any computation or, any arithmetical error in any computation.

(8) Save as aforesaid no certificate of the architect shall of itself be conclusive evidence that any works materials or goods to which it relates are in accordance with this contract.

Clause 30 envisages two types of certificates. Clause 30(1) and (2) deal with interim certificates while cl 30(6) deals with final certificates. I shall first deal with interim certificates. As *Hudson's Building and Engineering Contracts* (10th Ed) says at p 492, 'Provisions for interim or progress certificates are almost invariably inserted in building contracts for the benefit of the builder, to enable him to obtain payments on account during the progress of the work. As a rule, the payments contemplated by such provisions only represent the approximate value (or a proportion of it) of the work done, and possibly also of materials delivered to the site, at the date of payment (see *Pashby v Birmingham Co* (1856) 18 CB 2) and, in the absence of express provision, they are not conclusive or binding on the employer as an expression of satisfaction with the quality of the work or materials (see *Cooper v Uttoxeter Burial Board* (1865) 11 LT 565). ... Such certificates, then, are usually subject to readjustment, not only in the final certificate but also in subsequent interim certificates, though as a matter of pure valuation they may, in the absence of an overriding arbitration clause or a right of the employer to set off the cost of remedying or the value of defective work, be given binding effect until the time for the final certificate, or a subsequent amending interim certificate, has arrived' (see *Hudson's Building and Engineering Contracts* (10th Ed at p 493). The amount to be stated in the interim certificate is as described in cl 30(1). Clause 30(2) deals with the matters to be considered before arriving at the amount to be stated in it. The issue of an interim certificate to the contractor does not of itself entitle him to payment but it is a condition precedent for payment (see *Ling Heng Toh Co v Borneo Development Corp Sdn Bhd* [1973] 1 MLJ 23). The period for honouring the certificate shall be within the period for Honouring certificates named in the appendix to the agreement which is 14 days in this case. The phrase '... entitled to

payment therefor ...' in cl 30(1) means that the contractor is entitled to payment of the sum actually stated in the interim certificate to be due to the contractor from the employer, even if the certificate contains a latent or patent error (see *Lubenham Fidelities & Investment Co Ltd v South Pembrokeshire District Council* (1985) 33 BLR 39). In *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, an appeal involving summary judgment proceedings in a building contract case, the central issue for determination was whether there is an obligation imposed upon the employer to pay at once the amount stated in the interim certificate regardless of pending disputes, including cross-claims by the employer alleging defective work or over-valuation. In its judgment the Federal Court analysed in detail the provisions of the contract in that case which is identical to the agreement. Having considered the role of the architect as described in the relevant clauses of the contract and the remedies of the employer against the architect Edgar Joseph Jr FCJ said at p 69:

> Pausing at this point, we would observe that nowhere in the contract is there any provision whereby the builder must execute the works to the satisfaction of the employer according to the contract, the only instructions which the builder is under an obligation to comply with are those emanating from the architect. This would be in accordance with the reasonable expectations of businessmen engaged in the construction industry. Were it otherwise and, say, the builder were also under an obligation to comply with instructions emanating from the employer, a situation could arise where the builder might be faced with conflicting instructions from the architect and the employer, with resulting confusion, not conducive to a smooth performance of a contract.
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> Cast in his role of a professional middleman, the architect should, prima facie, be in an ideal position to ensure that both employer and contractor punctually carry out their respective obligations under the contract. This is not to say that if the employer is dissatisfied with the performance of his architect, he is without remedy. In such a situation, the employer may terminate the services of his architect and appoint a substitute architect or even sue his old architect. (See *Sutcliffe v Thackrah & Ors* [1974] AC 727; [1974] 1 All ER 859; [1974] 2 WLR 295.

With regard to the position where an employer may have a cross-claim his Lordship considered a plethora of authorities and said at pp 80-81:

> In all the circumstances, our conclusion therefore is that having regard to the meaning of the particular words of the contract, in particular the cll which we have referred to and discussed, there is a *clear implication* that the parties had intended that so far as claims for payment on certificates were concerned, the ordinary common law right of set-off was to be extinguished.

Accordingly, the Federal Court allowed the application for summary judgment in respect of the sum certified to be due and payable to the contractor in the interim certificate and added that the employer was at liberty to litigate its cross-claims, should it so wish. It thus follows that in the absence of the employer resorting to the remedies available to him he is obliged to honour the amount stated to be due in the interim certificate.

With regard to a final certificate cl 30(5) sets out the manner in which the contract sum is to be adjusted and the various steps needed before it is issued. Clause 30(5)(c) enumerates the matters which must be dealt with in the settlement of accounts. These are:

(a) amounts paid or payable to nominated sub-contractors;

(b) amounts paid or payable to nominated suppliers;

(c) amounts paid or payable for fees and charges under cl 4(2) if covered by a provisional sum in the contract Bills;

(d) amounts paid or payable for insurance under cl 19(2) for which a provisional sum was provided; and

(e) the amounts due for work done by the contractor under cl 27(g) for work covered by a PC sum.

Clause 30(6) provides a timetable for the issue of the final certificate which is the last certificate issued by the architect in connection with the contract. The final certificate should be issued 'as soon as practicable', that is to say, so soon as the necessary calculations have been carried out but in any event it must be issued not later than three months after the occurrence of whichever of the following three events occurs last:

(a) the end of the defects liability period;

(b) the date of issue of the certificate of making good defects under cl 15(4); or

(c) the date of receipt by the architect of the necessary documentation from the contractor under cl 30(5)(b).

Clause 30(6) also provides that the final certificate must state:

(a) the sum of the amounts already paid to the contractor under interim certificate and the amount named in the Appendix as the limit of retention fund;

(b) the contract sum as adjusted in accordance with the contract; and the

(c) the difference between these two items either as a balance due to the contractor or to the employer.

Subject to any deductions authorized by the conditions, for example, liquidated damages under cl 22, the balance as from the fourteenth day after presentation of the final certificate by the contractor to the employer shall be a debt payable by the employer to the contractor or as the case may be as from the fourteenth day after issue of the final certificate shall be a debt payable by the contractor to the employer. Clause 30(7) provides that, subject to three exceptions, and unless notice of arbitration has been given under cl 34 by either party before its issue or by the contractor within 14 days after its issue, the final certificate 'shall be conclusive evidence in any proceedings arising out of this contract ... that the works have been properly carried out and

completed in accordance with terms of this contract and that any necessary effect has been given to all the terms of this contract which require an adjustment to be made to the contract sum ... .' In *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER 121, followed in *Shen Yuan Pai v Dato Wee Hood Teck & Ors* [1976] 1 MLJ 16, the House of Lords considered the meaning of the words 'conclusive evidence in any proceedings arising out of this contract' in a similarly worded building contract clause and held that these words prevented any further legal action, including legal proceedings started long before the certificate was issued. It applies to arbitration and court proceedings. As to the time when the certificate becomes conclusive Lord Morris said at p 127:

> As by the terms of the agreement it was provided that disputes were to be referred to arbitration it was natural that cl 30(7) should deal with the situation where an arbitration was in train. A final certificate was then not to be conclusive evidence in the terms set out in cl 30(7). So if there was a written request to concur in the appointment of an arbitrator before a final certificate had been issued such final certificate would not be conclusive evidence. The contractors agree that the same result would follow if arbitration proceedings (though agreed on orally) were actually in progress or had been agreed on. In practice if arbitration proceedings were in progress or were pending there would almost certainly have been some previous written request to concur in the appointment of an arbitrator.
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> But what is the position if there has been no reference to arbitration and no initiation of such a reference by the giving of a written request to concur in the appointment of an arbitrator? In that event unless words are to be written into cl 30(7) the position would be that a final certificate would be conclusive evidence (in the terms of cl 30(7)) in any proceedings whether by arbitration proceedings 'or otherwise'. The words 'or otherwise' must denote court proceedings. The only exception to this would be that the contractor (but only he) could deny to a final certificate the attribute of being conclusive evidence by writing within 14 days to request arbitration.

Thus the conclusiveness of a final certificate can be challenged only if a request for arbitration is sought within the period specified in cl 30(6) and (7). In that event the final certificate ceases to be final and may be re-opened for resolution.

With regard to the form of the certificate BTH Lee J said in *Shen Yuan Pai v Dato Wee Hood Teck & Ors* [1976] 1 MLJ 16 at p 19:

> As no form is prescribed, it is in my view for the architect to determine the form and nature of certificates as he may think fit.

I shall now consider the status of the two certificates relied on by the plaintiff in this case. They are annexed to his statement of claim. I consider it necessary to reproduce them. They are in the following terms:

(i) *Architect's Certificate No 05 bearing Serial No AS 9205 dated 15 November 1994:*

DIRECTION

AKITEK SURIA
56A, Paras 1,2 & 3
Jalan Negara, Metro
Melawati 1,
53100 Kuala Lumpur

Serial No AS 9205

Job title and No:	AS 9205 Cadangan Membina sebuah Rumah 2 Tingkat dengan 'split Level' dan Kolam Renang, di atas Lot 6957 & 6958 Jalan Lee Hin Neo, Ukay Height, Mukim Ulu Kelang, Selangor	Certificate No 05 (Penultimate) Date: 15 Nov 1994

Gentleman/Gentlemen,
We attach our certificate for: (Ringgit: Two Hundred and Ninety Two Thouand Five Hundred and Fifty Four and Cents Two only)

Which should be sent separately to the employer

Signature ..... Sgd .....
Mior Zawari Hj Hassan
B Arch (Hons)(UTM) APAM
(A/M 25)

RM 292,554

Architect

Included in the amount of this certificate is the gross value of the work, materials or goods due to the nominated sub-contractor (S), as indicated below, in respect of which you are hereby directed to make the following payments subject to retention in accordance with cl 27(viii):

Firm	Work executed	Gross amount included to date $ —	Gross amount previously certified	Gross amount included in this certificate
USAHABINA Lot 1700, Jalan Kota, Pintu Geng, 15100 Kota Bahru, KELANTAN DARUL NAIM				

	Work executed	RM 814,343.35
	Less Previously certified	RM 506,391.75
Send entire sheet to main contractor Main contractor to tear off certificate here and send To employer	Less 5% retention	RM 307,951.60 RM 15,397.58
	Amount due	RM 292,554.02

A

AKITEK SURIA
56A, Paras 1,2 & 3
Jalan Negara,
Metro Melawati 1,
53100 Kuala Lumpur

Architect

Certificate

Serial No AS 9205

Certificate No 05

B

To [employer]: En Anuar bin Yahya

(Penultimate)

We hereby certify that under the terms of contractor (sic) the sum of (Ringgit: Two Hundred and Ninety Two Thousand Five and Fifty Four And Cents Two only)

Date: 15 November 1994

C

RM292,554.02

USAHABINA
Lot 1700, Jalan Kota Pintu Geng,
15100 Kota Bahru,
KELANTAN DARUL NAIM

D

Is due to [main contractor]:

Previous instalments: RM506,291.75

E

Total to date: RM814,343.35

On account of works at: Lot 6957 & 6958, Jalan Lee Hin Neo, Ukay Height, Ulu Kelang, Selangor

Date of contract: 12 January 1993

F

Amount of contract:

RM1,226,177.40

Signature..... Sgd.....
Mior Zawari Hj Hassan
B Arch (Hons)(UTM)
APAM (APM 25)

Architect

G

(ii) *Architect Certificate No 06 bearing Serial No AS 9205 dated 17 April 1996:*

H

DIRECTION

AKITEK SURIA
56A, Paras 1,2 & 3
Jalan Negara, Metro
Melawati 1,
53100 Kuala Lumpur

9205

Serial No: AS

I

AS 9205

A

Job title and No:	AS 9205 Cadangan Membina Sebuah Rumah 2 Tingkat dengan 'split Level' Dan Kolam Renang, Diatas Lot 6957 & 6958 Jalan Lee Hin Neo, Ukay Height, Mukim Ulu Klang, Selangor.	Certificate No: 06 (Final) Date: 17 April 1996

B

Gentleman /Gentlemen,
We attach our certificate for:

(Ringgit: One Hundred Seventy for Thousand Eight Hundred Fifth Six and Cents Ninety Six only)

C

Which should be sent separately to the employer

Signature ..... Sgd .....
Mior Zawari Hj Hassan
B Arch (Hons)(UTM) APAM
(A/M 25)

RM 174,856.96

Architect

D

Included in the amount of this certificate is the gross value of the work, materials or goods due to the nominated sub-contractor (S), as indicated below, in respect of which you are hereby directed to make the following payments subject to retention in accordance with cl 27(viii):

E

Firm	Work executed	Gross amount Included to date $—	Gross amount Previously certified	Gross Amount Included in this certificate

F

USAHABINA
Lot 1700, Jalan Kota,
Pintu Geng,
15100 Kota Bahru,
KELANTAN DARUL NAIM

G

Send entire sheet to main contractor Main contractor to tear off certificate here and send to employer

H

AKITEK SURIA
56A, Paras 1,2 & 3
Jalan Negara,
Metro Melawati 1,
53100 Kuala Lumpur

Architect

Certificate

Serial No AS 9205

Certificate No 06 (Final)

I

To [employer]: En Anuar bin Yahya Date: 28 April 1996

We hereby certify that under the terms of contractor (sic) the sum of (Ringgit: One Hundred Seventy Four Thousand Eight Hundred Fifty Six and Cents Ninety Six Only) RM174,856.96

USAHABINA
Lot 1700, Jalan Kota Pintu Geng,
15100 Kota Bahru,
KELANTAN DARUL NAIM

Is due to [main contractor]:

Previous instalments: RM814,343.35

Total to date: RM989,200.31

On account of works at: Lot 6957 & 6958, Jalan Lee Hin Neo, Ukay Height, Ulu Kelang, Selangor

Date of contract: 12 January 1993

Signature.....Sgd.....
Mior Zawari Hj Hassan
B Arch (Hons)(UTM)
APAM (APM 25)

Amount of contract: RM989,200.31

Architect

Certificate No 05 dated 15 November 1994 although called a penultimate certificate is an interim certificate as it was issued before the completion of the works. Certificate No 06 dated 28 April 1996 was issued after the issue of the certificate of making good defects and is referred to as 'final'. It states that an amount of RM174,856.96 is due to the contractor. However, when it was issued the amount due as stated in the penultimate certificate was also due. Thus the amount stated in it as being due is not in accordance with cl 30(6). In the final certificate a statement of the final balance is indispensable (see *Kirsch v HP Brady Pty Ltd* (1937) 58 CLR 36). In my opinion therefore this certificate must also be regarded as an interim certificate as it specifies only the amount then due without taking into account previous balances due. The law that I have adverted to makes it clear that if the defendant wished to dispute the amounts stated in the two certificates he ought to have asked the architect to make appropriate adjustments in another certificate or take the dispute to arbitration both of which he did not do. Even if certificate No 06 dated 28 April 1996 is to be regarded as a final certificate the result would be the same in view of the conclusiveness of the certificate. In any event the judgment of the Federal Court in *Pembenaan Leow Tuck Chui & Sons Bhd v Dr Leela's Medical Centre Sdn*

Bhd [1995] 2 MLJ 57 will make a reference to arbitration in this case an exercise in futility. In view of the obligation of the defendant to pay under the certificates the arbitrator will merely have to make an order in terms of the amounts stated to be due in the certificates. This means that the defendant has effectively lost his right to arbitration by not seeking arbitration within the time stipulated in the agreement. This certainly militates against exercising the discretion in favour of the defendant to stay the proceedings as he will achieve precious little before the arbitrator.

Another ground upon which the defendant is seeking a stay of proceedings can be gleaned from para 7 of his affidavit affirmed on 5 September 1997. It reads as follows:

> Plaintif sedar dan tahu bahawa sijil-sijil arkitek itu tidak tepat. Plaintif tidak boleh sekarang menggunakan sijil-sijil arkitek itu pula untuk membuat tuntutan terhadap saya di mahkamah. Plaintif seharusnya membawa arkitek itu duduk bersemuka dengan saya dan sidang yang terbaik ialah di timbangtara.

The only way in which the architect can be brought in is by way of third party proceedings. Such proceedings are not compatible with the rules relating to arbitration. In this regard I refer to *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273 where Gopal Sri Ram JCA in writing for the Federal Court said at p 282:

> The residual discretion which the court retains is limited to a very narrow class of cases, such as those involving fraud or where there is, on a proper construction of the arbitration clause, no dispute that falls within its purview or where the third party procedure under the rules of court will most probably be resorted to. In the last of these situations, it is trite that an arbitrator has no jurisdiction to order third party proceedings.

Accordingly, I hold that a stay of proceedings in this case was not warranted prior to entry of judgment against the defendant. Thus, the judgment obtained against him is regular.

What now arises for determination is whether the judgment in default obtained by the plaintiff ought to be set aside. In the light of the views that I have expressed on the right of the defendant to arbitrarion his contention that he did not file his defence in order to preserve his rights to arbitration cannot be sustained. The defendant has therefore failed to advance any cogent reasons to explain his failure to file his defence on time despite the grant of an extension of time to do so. My discussion on the effect of the certificates issued by the architect show that there are no merits in the defence. In particular the judgment of the Federal Court in *Pembenaan Leow Tuck Chui & Sons Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 illustrates that a consideration of the merits of the defence on the facts of this case will not serve any useful purpose. I therefore hold that the defendant has not succeeded in

establishing sufficient grounds to have the judgment entered against him to be set aside.

In the upshot, I dismiss the application with costs.

Application dismissed.

Reported by Jafisah Jaafar